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| EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW

| Case Law Bulletin

Week of December 4, 2017

Second Circuit

[Bastian-Mojica v. Sessions](#), No. 16-3331, 2017 WL 6016358 (2d Cir. Dec. 5, 2017) (unpublished) (AggFel)

The Second Circuit granted the PFR and vacated the Board's order, concluding that its prior circuit precedent decisions did not definitively adjudicate the issue of whether Connecticut larceny qualified as an aggravated felony theft offense under section 101(a)(43)(G) of the Act (here, petitioner's conviction was for violating Conn. Gen. Stats. § 53a-125 (fourth degree larceny)) and that the Board has treated Connecticut's larceny offense inconsistently in its prior unpublished decisions due to following that precedent. The court directed the Board to explain on remand "whether it considers Connecticut's larceny offense to be categorically an aggravated felony theft offense in light of the Board's distinction between theft and fraud."

Fourth Circuit

[Romero Zambrano v. Sessions](#), No. 16-2131, 2017 WL 6031842 (4th Cir. Dec. 5, 2017) (Asylum-1-year filing deadline)

The Fourth Circuit granted the PFR and vacated the Board's order, agreeing with the Second, Sixth, and Ninth Circuits and concluding that new facts that provided additional support for a pre-existing asylum claim can satisfy the "changed circumstances" exception to the one-year filing deadline at section 208(a)(2)(D) of the Act. The court noted that the new facts "may include circumstances that show an intensification of a preexisting threat of persecution or new instances of persecution of the same kind suffered in the past."

Ninth Circuit

[Both v. Sessions](#), No. 09-72024, 2017 WL 6014049 (9th Cir. Dec. 5, 2017) (unpublished) (Asylum-Persecution)

The Ninth Circuit granted the PFR and remanded to the Board, concluding that the record compels the conclusion that petitioners suffered past persecution on account of their Romanian background and that the Board's determination that petitioners had failed to establish that the Austrian government was unable or unwilling to control the family's assailants is not supported by substantial evidence. The court noted that while petitioners requested assistance from the police and other governmental authorities on three separate occasions, the police and other authorities did not provide assistance, meted out "superficial 'punishment,'" or actively disparaged them.

[Martinez v. Sessions](#), No. 14-72593, 2017 WL 6047281 (9th Cir. Dec. 7, 2017) (unpublished) (NACARA-GMC)

The Ninth Circuit granted the PFR and remanded, concluding that the Board erred in affirming the IJ's denial of petitioner's NACARA application on the basis of his purportedly false statements given at hearings conducted on dates outside the relevant time period during which good moral character is required under section 203 of NACARA.

[Khan v. Sessions](#), No. 14-73902, 2017 WL 6047287 (9th Cir. Dec. 7, 2017) (unpublished) (Asylum-ACF)
[United States v. Murillo-Alvarado](#), No. 14-50354, 2017 WL 5986574 (9th Cir. Dec. 4, 2017) (USSG)
[United States v. Valdivia-Flores](#), No. 15-50384, 2017 WL 6044232 (9th Cir. Dec. 7, 2017) (AggFel)

The Ninth Circuit granted the PFR and remanded, concluding that the Board provided no "specific and cogent reason[] to support" the agency's adverse credibility determination. The court noted that the USCIS's issuance of an EAD is not the same as receipt and does not provide evidence of petitioner's presence in the United States on a certain date. The court also noted that no corroboration of petitioner's testimony is required because the instant case is a pre-REAL ID Act case.

The Ninth Circuit affirmed the district court's sentence, relying on the reasoning in [United States v. Martinez-Lopez](#), 864 F.3d 1034 (9th Cir.

2017), which involved a similar statute, to conclude that Cal. Health and Safety Code § 11351 (possession or purchase for sale of designated controlled substances) is divisible with regard to its controlled substance requirement. After applying the modified categorical approach, the court determined that petitioner's conviction for possession of cocaine for sale under section 11351 qualifies as a drug trafficking offense for purposes of U.S.S.G. § 2L1.2(b)(1)(A).

The Ninth Circuit reversed the district court's sentence and remanded, concluding that petitioner was deprived of due process because his waiver of right to seek judicial review of his underlying removal order was not considered and intelligent. The court further concluded that petitioner's conviction in violation of Wash. Rev. Code § 69.50.401 (possession of a controlled substance with the intent to distribute) was not categorically an aggravated felony under section 101(a)(43)(B) of the Act, determining that Washington's drug trafficking statute has a more inclusive mens rea requirement (knowledge) for accomplice liability than its federal analogue (specific intent) and that the state statute was not divisible so far as the distinction between principal and accomplice was concerned.

Tenth Circuit

[United States v. Benton](#), No. 16-3332, 2017 WL 6062751 (10th Cir. Dec. 8, 2017) (COV)

[United States v. Kendall](#), No. 16-6344, 2017 WL 6273210 (10th Cir. Dec. 11, 2017) (COV)

The Tenth Circuit affirmed the district court's sentence, concluding that petitioner's conviction under Kan. Stat. Ann. § 21-3410(a) (aggravated assault with a deadly weapon) qualifies as a crime of violence under the force clause of U.S.S.G. § 4B1.2(a) (same as 18 U.S.C. § 16(a)).

The Tenth Circuit affirmed the district court's sentence, concluding that petitioner's convictions in violation of 18 U.S.C. § 111(b) (forcibly assaulting a federal officer and inflicting bodily injury) and D.C. Code § 22-405(c) (assault on a police officer) qualify as crimes of violence under the force clause of U.S.S.G. § 4B1.2(a) (same as 18 U.S.C. § 16(a)).